Dominic Thomas v Public Prosecutor

HIGH COURT (KANGAR) — CRIMINAL APPEAL NOS 42A–01–2006 AND 42A–02–2006
ZAMANI A RAHIM JC
27 NOVEMBER 2008

Criminal Law — Firearms (Increased Penalties) Act (Malaysia) — s 8 — Possession of firearm and ammunitions — Whether pistol and ammunition produced in court same with one seized from accused — Whether armourer's evidence admissible — Whether accused exempted from holding licence

Criminal Procedure — Sentence — Possession of firearms — Whether offences arose out of same transaction — Whether sentences should be concurrent

The appellant was arrested on 29 December 2004 and was charged for possession of firearm and ammunitions. He was acquitted on 27 April 2005 and discharged without calling for his defence. The prosecution appealed and the learned High Court judge allowed the appeal and called for the appellant's defence. Subsequently, the appellant was convicted and sentenced to six years imprisonment and six strokes of whipping on the first amended charge and four years imprisonment on the second amended charge. The appellant appealed against the conviction whereas the prosecution appealed against the inadequacy of the sentence. The appellant submitted that as a police officer and by virtue of s 6(2) of the Arms Act 1960 ('the Act'), he was exempted from holding any arms licence or permit. The appellant further argued that there were unsatisfactory features in the prosecution's case which threw doubt as to whether the pistol and ammunitions were the very exhibits recovered from the appellant which was sent to the armourer. The appellant further argued that there was violent discrepancy in relation to the description of the pistol by the prosecution witnesses.

Held, dismissing the appellant's appeal and allowing the prosecution's appeal:

(1) There was no break in the chain of evidence relating to the retention of the pistol and the ammunitions when it were seized from the appellant till it was handed over to the investigating officer who kept them in a locked cabinet. The violent discrepancy argued by the appellant related to the working mechanism of the pistol and all the prosecution

witnesses who handled and kept the firearm were called to testify. The pistol and the ammunition produced in court were the very same pistol and ammunition seized from the appellant's trousers pocket (see para 20).

(2) The armourer's evidence was based on his observation and physical examination of the pistol and was not based on any opinion at all. It was therefore not fatal for the armourer not to mention that the pistol came within the definition of 'firearm' under s 2 of the Firearm (Increased Penalty) Act 1971. Further, the armourer was not cross examined and his evidence was never challenged by the defence. As such the armourer's evidence ought to be accepted until it is rebutted (see paras 43–45).

(3) The appellant though a police officer could not rely on the exemption in s 6(2)(e) of the Act for not having the arms licence, as he was not engaged in carrying out any police duty at the material time. The appellant had, therefore, failed to discharge the burden that he had a licence, a fact peculiarly within his own knowledge and as such the prosecution had succeeded in establishing a prima facie case against the appellant (see paras 52–53).

(4) The appellant had failed to raise any reasonable doubt as to his guilt or the prosecution's case and the prosecution had proved its case beyond reasonable doubt. Therefore, the prosecution's appeal on inadequacy of sentences was allowed. Based on the facts, it was evident that the offences arose out of the same transaction and thus the sentences imposed should be concurrent. In the circumstances, the sentences were substituted with sentences of eight years imprisonment and six strokes of whipping and four years imprisonment respectively on both charges, to run concurrently with effect from the date the appellant's defence was called (see paras 56, 59 & 62).

[Bahasa Malaysia summary

Perayu ditangkap pada 29 Disember 2004 dan dituduh atas milikan senjata api dan amunisi. Dia dibebaskan pada 27 April 2005 dan dilepaskan tanpa pembelaannya dipanggil. Pihak pendakwaan merayu dan hakim Mahkamah Tinggi yang bijaksana membenarkan rayuan tersebut dan meminta perayu memasukkan pembelaannya. Kemudian, perayu disabitkan dan dihukum enam tahun penjara dan enam kali sebatan atas pertuduhan terpinda yang pertama dan empat tahun penjara atas pertuduhan terpinda yang kedua. Perayu merayu terhadap sabitan manakala pihak pendakwaan merayu terhadap kekurangan hukuman. Perayu menghujah bahawa sebagai pegawai polis dan melalui s 6(2) Akta Senjata 1960 ('Akta'), dia dikecualikan daripada memiliki apa-apa lesen atau permit senjata api. Perayu selanjutnya

menghujah bahawa terdapat unsur-unsur yang tidak memuaskan di dalam kes pihak pendakwaan yang memberikan keraguan sama ada pistol dan amunisi tersebut merupakan ekshibit yang sama yang diambil daripada perayu yang dihantar kepada pegawai persenjataan. Perayu selanjutnya menghujah bahawa terdapat percanggahan yang hebat berkenaan dengan deskripsi pistol oleh saksi-saksi pihak pendakwaan.

Diputuskan, menolak rayuan perayu dan membenarkan rayuan pihak pendakwaan:

(1) Tidak terdapat pemecahan pada rantaian keterangan berkaitan dengan penyimpanan pistol dan amunisi apabila ia dirampas daripada perayu sehingga ia diberikan kepada pegawai penyiasat yang menyimpannya di dalam kabinet yang berkunci. Percanggahan hebat yang dihujahkan oleh perayu berkaitan dengan mekanisme penggunaan pistol dan saksi-saksi pihak pendakwaan yang mengendalikan dan menyimpan senjata api tersebut dipanggil untuk memberi keterangan. Pistol dan amunisi yang dikemukakan di mahkamah adalah pistol dan amunisi yang sama yang dirampas daripada saku seluar perayu (lihat perenggan 20).

(2) Keterangan pegawai persenjataan adalah berdasarkan pemerhatian dan pemeriksaan secara fizikal pistol tersebut dan tidak berdasarkan apa-apa pendapat. Oleh itu ia tidak menjejaskan bagi pegawai persenjataan untuk tidak menyatakan bahawa pistol terangkum dalam definisi 'senjata api' di bawah s 2 Akta Senjata Api (Penalti Lebih Berat) 1971. Selanjutnya, pegawai persenjataan tidak diperiksa balas dan keterangannya tidak pernah dicabar oleh pembelaan. Oleh itu keterangan pegawai persenjataan mesti diterima sehingga ia dipatahkan (lihat perenggan 43–45).

(3) Walaupun perayu seorang pegawai polis dia tidak boleh menyandar atas pengecualian di dalam s 6(2)(e) Akta bagi ketiadaan lesen senjata api, kerana dia tidak terlibat dalam melakukan apa-apa tugasan polis pada masa material. Perayu oleh itu telah gagal melepaskan beban bahawa dia mempunyai lesen, suatu fakta yang khusus di dalam pengetahuannya sendiri dan oleh itu pihak pendakwaan telah berjaya membuktikan kes prima facie terhadap perayu (lihat perenggan 52–53).

(4) Perayu telah gagal untuk membangkitkan apa-apa keraguan yang munasabah berkenaan dengan kesalahannya atau kes pihak pendakwaan dan pihak pendakwaan telah membuktikan kesnya melampaui keraguan yang munasabah. Oleh itu, rayuan pihak pendakwaan terhadap kekurangan hukuman dibenarkan. Berdasarkan atas fakta, ia juga jelas bahawa kesalahan-kesalahan tersebut berbangkit

daripada transaksi yang sama dan oleh itu hukuman yang dikenakan sewajarnya serentak. Dalam keadaan sedemikian, hukuman yang dikenakan digantikan dengan lapan tahun penjara dan enam kali sebatan dan empat tahun penjara masing-masing untuk kedua-dua pertuduhan, dijalankan serentak berkuat kuasa daripada tarikh pembelaan perayu dipanggil (lihat perenggan 56, 59 & 62).]

Notes

For a case on sentence for possession of firearms, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 3924.

For cases on Firearms (Increased Penalties) Act (Malaysia) generally, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 678–684.

Cases referred to

Abdul Jalil bin Abdul Satar v PP [1991] 2 MLJ 194; [1991] 2 CLJ 1089, SC (refd)
Abu Seman v PP [1982] 2 MLJ 338, HC (folld)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Jarnail Singh v State of Punjab AIR 1999 SC 321 (refd)
John v Humpreys [1955] 1 All ER 793, QBD (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265, SC (refd)
Mat v PP [1963] MLJ 263, HC (refd)
Ooi Sim Yim v PP [1990] 1 MLJ 88; [1990] 1 CLJ 435, SC (refd)
PP v Chung Kwong Huah [1981] 1 MLJ 316, HC (folld)
PP v George Abraham [1978] 1 MLJ 79, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (folld)
PP v Muhamed bin Sulaiman [1982] 2 MLJ 320, FC (refd)
PP v Teh Ah Cheng [1976] 2 MLJ 186, HC (folld)
Rooker v Rooker 164 ER 1379 (refd)
Shukri bin Mohamed v PP [1995] 3 MLJ 229, SC (refd)
Sun Kam Heng v PP [1992] 2 MLJ 826, SC (refd)
Teoh Hoe Chye v PP [1987] 1 MLJ 220, SC (refd)
Wong Chooi v PP [1967] 2 MLJ 180, HC (refd)

Legislation referred to

Arms Act 1960 ss 6(2), (2)(e), 8(a), 9(a)
Criminal Procedure Code s 294
Evidence Act 1950 s 106
Firearms (Increased Penalties) Act 1971 ss 2, 8, 9
Internal Security Act 1960 ss 2, 57(1)
Police Act 1967 ss 2, 19

Dev Kumarendran (Kumar & Co) for the appellant.
Azman bin Abu Hassan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zamani A Rahim JC:

THE CHARGES

[1] The appellant was first charged on 11 January 2005 with two offences under s 8 of the Firearms (Increased Penalties) Act 1971 and s 8(a) of the Arms Act 1960 respectively. The charges were as follows:

(a) First Amended Charge

> Bahawa kamu pada 29 Disember 2004 jam lebih kurang 1.05 tengahari, di Pejabat Agensi Dadah Kebangsaan Padang Besar, di dalam Daerah Kangar, di dalam Negeri Perlis telah didapati dalam milik kamu sepucuk pistol semi-automatic jenis NORINCO siri No 318361 tanpa sebarang permit atau lesen yang sah. Oleh yang demikian, kamu telah melakukan satu kesalahan dan boleh dihukum di bawah Seksyen 8 Akta Senjata Api (Penalti Lebih Berat) 1971.

(b) Second Amended Charge

> Bahawa kamu pada 29 Disember 2004 jam lebih kurang 1.05 tengahari, di Pejabat Agensi Dadah Kebangsaan Padang Besar, di dalam Daerah Kangar, di dalam Negeri Perlis telah didapati dalam milik kamu sebanyak 28 butir peluru iaitu jenis S & B, 9mm Luger 3 peluru, Manchester Win 9mm Luger 5 butir, R-P 9mm Luger 20 butir, tanpa sebarang permit atau lesen yang sah. Oleh yang demikian, kamu telah melakukan satu kesalahan dan boleh dihukum di bawah Seksyen 8(a) Akta Senjata (Act 206).

PRELIMINARY MATTERS

[2] The appellant was arrested on 29 December 2004 for possession of firearm and ammunitions. The possession of firearm is an unbailable offence. His case was heard by the learned sessions court judge whereby the appellant was acquitted and discharged without calling for his defence on 27 April 2005. That mean he was in custody for about four months before his acquittal.

[3] Thereafter, the prosecution appealed against the acquittal. The appeal was heard on 9 December 2005. The learned High Court judge who heard the appeal, allowed the prosecution's appeal and ordered the defence to be called on 14 April 2006. The appellant was taken into custody and had been in remand since then without bail.

[4] Pursuant to the order of the learned High Court judge, the learned sessions court judge heard the defence and at the end of the defence case, the appellant was convicted and sentenced to six years imprisonment and six strokes of whipping on the first amended charge under s 8 of the Firearms (Increased Penalties) Act 1971 and further sentenced the appellant to four years imprisonment on the second amended charged under s 8(a) of the Firearm Act 1960. Both the sentences of the imprisonment terms were to run consecutively with effect from the date of arrest, that is 29 December 2004.

[5] The appellant is now appealing against the conviction vide Appeal No 42A-01-2006, whilst the learned public prosecutor is appealing against the inadequacy of sentence vide Appeal No 42A-02-2006.

[6] Now, I propose to deal with the appellant's appeal on conviction first. If he succeeds, the whole appeal end here. The prosecution need not proceed with its appeal. If the appellant fails, then I will proceed to hear the prosecution appeal on inadequacy of sentence.

FACTS OF THE CASE

[7] The appellant was arrested by C/Insp Mior Abdul Khalil bin Abd Aziz, PW7 on 29 December 2004 at Unit Pengesanan Dadah Sempadan Agensi Dadah Kebangsaan Padang Besar, Perlis. A body search was conducted on the appellant by PW7 and witnessed by D/Sjn Musa bin Ulul Azmi. PW7 found a police authority card RF No 100933 in the name of the appellant — Dominic a/l Thomas. PW7 knew the appellant was a police officer attached to the Perlis Police Contingent.

[8] Subsequently, a pistol type NORINCO automatic made in China together with a magazine intact inside the pistol was recovered from the appellant's right trousers pocket. Inside the magazine, PW7 found three rounds of ammunition. PW7 also found another 25 rounds of ammunition inside a plastic bag in the appellant's left trousers pocket. All in all 28 rounds of ammunition were found by PW7. Of the 28 rounds of ammunition, three ammunitions were type S & B, five ammunitions were type Manchester Win and 20 ammunitions were type R-P 9mm Luger.

[9] The prosecution called C/Insp Engku Zainuddin bin Che Engku Chik, PW3. He was the armourer. He was working as 'Pegawai Persenjataan' for seven years and attended a course for nine months at Maktab Teknik Polis, Bakri, Muar.

[10] According to PW3, he received the pistol on 3 January 2005. It was a semi-automatic type NORINCO and three rounds of ammunition in the

magazine were type 9mm. The other ammunitions — five ammunitions were Manchester Win 9 mm and 20 rounds of ammunition were R-P 9mm Luger. PW3 had prepared the report of his examination, P18.

THE LAW AT THE CLOSE OF THE PROSECUTION'S CASE

[11] At the close of the prosecution's case, my task is to determine whether the prosecution has established a prime facie case against the accused. In so determined, I am guided by the following steps summarised in the Federal Court case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 at p 400 (MLJ) and p 467 (CLJ).

(i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from the evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) Ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict; and

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] MLJ 263.

DOUBT AS REGARD TO PISTOL AND AMMUNITIONS

[12] According to learned counsel for the appellant, there were unsatisfactory features in the prosecution's case which threw doubt as to whether the pistol, P4; the magazine, P4A, the ammunitions, P16A1–17, P16B1–3, P71–4 and P8A were the very exhibits recovered by PW7 which were sent to the armourer, PW3 and also whether the pistol, P4 came within the definition of 'firearm' under the Firearms (Increased Penalties) Act 1971.

[13] The gist of the appellant's complaint here was the discrepancies regarding of the description of the pistol given by the armourer, PW3 and the arresting officer PW7 who recovered the pistol and ammunitions. PW3 stated

that he received and conducted the test on a semi-automatic pistol, P4. PW3's evidence as cited by the appellant's counsel in his written submission was as follows:

> Masa terima pistol, pistol semi auto Model 213 9 x 9 mm NORINCO.

[14] Whilst PW7 gave evidence that he recovered an automatic pistol of NORINCO brand. PW7's evidence as quoted by the appellant's counsel in his written submission was as follows:

> Semasa periksa dan jumpa pistol, saya rampas pistol tersebut. Pistol itu berwarna hitam jenis otomatik, jenama NORINCO buatan China nombor sirinya 318361.

[15] There appears to be doubt whether the pistol was an automatic NORINCO pistol No 318361 or a semi-automatic pistol NORINCO which was recovered from the appellant. The distinction — automatic and semi-automatic — gave raised to doubt and the doubt should be given to the appellant. To support his contention, learned counsel for the appellant cited the Supreme Court case of *Teoh Hoe Chye v Public Prosecutor* [1987] 1 MLJ 220 and *Abdul Jalil bin Abdul Satar v Public Prosecutor* [1991] 2 MLJ 194; [1991] 2 CLJ 1089. These are cases relating to doubt as to the identity of the drugs which form the subject of the charges, a failure to adduce evidence to provide the necessary link in the chain of evidence was fatal to the prosecution's case. If there is a break in the chain of evidence relating to the identity of drugs, the accused is entitled to an acquittal at the end of the prosecution's case.

[16] In the context of this case, a more pertinent case to consider is the Supreme Court case of *Sun Kam Heng v PP* [1992] 2 MLJ 826. Here the appellant was charged in the High Court for possession of unlawful firearm and ammunition, offences under the Internal Security Act 1960 ('ISA'). The appellant was convicted of both charges and sentenced to death under s 57(1) of the ISA. He appealed to the Supreme Court.

[17] The salient facts and argument in *Sun Kam Heng*, were these. The appellant had committed robbery and he was chased by the police. He was arrested within minutes of the robbery at gun point. The police seized the firearm from his hand. The submission advanced on behalf of the appellant were as follows:

(a) the evidence of Inspector Manan was self contradictory regarding the weapon seized from the appellant's hand, initially he used the word 'pistol' and later described it as 'revolver'.

(b) none of the police officers involved in the arrest of the appellant, marked the weapon such as scratch mark or the like, to confirm the seizure. Failure to mark the weapon became more important because the weapon had no serial numbers and there were contradictions as to who actually snatched the weapon from the appellant's hand.

(c) In addition, the weapon and its ammunitions was snatched by the police from the appellant's hand on the day of his arrest, that is, 18 January 1987 and the evidence showed it was sent to the armourer on 21 January 1987 for examination and subsequently to the government chemist. During the duration of three days (between 18 and 21 January 1987) the weapon was kept in a steel cabinet of one DSP Bahadom. But DSP Bahadom was not called to testify or offered to the defence, though his attendance was available.

[18] Edgar Joseph SCJ had this to say at p 830:

> However, the real point in this appeal was that although it was the case for the prosecution that the revolver which had been snatched from the appellant's hand on 18 January 1987, had been sent to the armourer ASP Haji Ishak on 21 January 1987 for examination and report, and later to the government chemist, it had, during the intervening three days, that is to say, between 18 and 21 January 1987, been lying in the safe of the superior of ASP Haji Ishak, a certain DSP Bahadom, yet the latter was neither called nor even offered by the prosecution to the defence though he was apparently available.

[19] In the next two paragraphs on the same p 830, His Lordship said:

> It follows, therefore, that all this evidence regarding the movements of the revolver (P3), and the ammunition (P9B), was when they were on their way to the armourer and the chemist, and then back to the investigating officer and does nothing to repair the gap in the case for the prosecution, regarding the whereabouts of the weapon described as a revolver; snatched from the hand of the appellant, during the crucial three days when it was allegedly lying in the safe of DSP Bahadom.

[20] Towards the end of the judgment at p 831, His Lordship had this to say:

> It goes without saying that the burden was upon the prosecution from beginning to end and from first to last to prove beyond a reasonable doubt that the subject matter of the charges, being the revolver (P3) with the ammunition in it (P9B), which had been produced in the court below was the very thing described as a revolver, which had been snatched from the hand of the appellant on the date and at the time and place mentioned in the charges.

We would add that the entire expert testimony of the armourer and the report of the government chemist had been directed towards establishing that the revolver and the ammunition in it, being exhs P3 and P9B, came within the expression 'firearm' and 'ammunition' respectively, as defined in s 2 of the Act (Rev 1974).

If therefore, there was a break in the chain of evidence relating to the retention of what was described as a revolver, which had been snatched from the hand of the appellant, at any time before it was allegedly sent to the armourer; in particular, during the crucial three days when it was allegedly lying in the safe of DSP Bahadom, then the testimony of the armourer and the report of the chemist would have to be disregarded as being irrelevant to the charges.

[21] In this case, the evidence relating to the handling and custody of the pistol P4 and ammunitions involved three witnesses, namely, the police officer who recovered the pistol from the appellant, PW7, the investigating officer, PW8 and the armourer, PW3.

[22] PW7 said that he conducted the search on the appellant's body on 29 December 2004, at about 1.05pm where he found an automatic NORINCO brand pistol, made in China. It was black in colour. The pistol had serial No 318361. Despite having serial numbers, PW7 had appended his signature on the top front of the pistol and also wrote the date 29 December 2004. He also placed his signature and the date 29 December 2004 on the magazine of the pistol, P4A. He also placed identification marks on the three rounds of ammunition 9mm size found in the magazine.

[23] PW7 could also identify 25 rounds of ammunition, P6(1–3), P6(1–17) 7(1–4) and P8A. He had placed his signature on each of the ammunitions and wrote the date 29 December 2004. He could also identify the plastic, P11 which was used to wrap the 25 rounds of ammunition. He had put his signature and the date 29 December 2004 on P11.

[24] PW7 said that on the same day ie 29 December 2004, at about 5.30pm, he handed all the exhibits, the accused and three others to the investigating officer, PW8.

[25] PW8 said he received the pistol, P4, its magazine, P4A and ammunitions, P6(1–3), P6A (1–17), P7 (1–4) and P8A from PW7. He could identify the pistol and the magazine. The pistol was of NORINCO brand, made in China, bearing serial No 318361. He also could identify the plastic, P11 which was used to wrap the 25 rounds of ammunition.

[26] According to PW8, he kept all the exhibits in his cabinet. He locked it. And on 3 January 2005, he sent the pistol and ammunitions to the contingent armourment officer, PW3. He received back the exhibits on

A 6 January 2005 together with its report, P18. On 10 January 2005, PW8 handed over the exhibits to the storekeeper, L/Cpl Rosli.

[27] In his evidence, PW3 said that on 3 January 2005, he received the exhibits, namely, a semi-automatic pistol of NORINCO brand together with its magazine with serial No 318361 on it. PW3 could identify the pistol, P4 as he placed his signature on it in black. He also received 28 rounds of ammunition of various types namely, three rounds of ammunition of type S & B; five rounds of ammunition of Manchester Win 9mm and 20 rounds of ammunition of R-P 9mm Luger.

[28] PW3 too said, he put identification marks on the ammunitions and its empty shells. He kept all the exhibits in the almeirah in his office. No persons could interfere with the exhibits.

[29] In this case, all the three prosecution witnesses PW3, PW7 and PW8 described the weapon as 'pistol of NORINCO brand, made in China, bearing serial No 318361'. PW3, PW7 and PW8 could identify the pistol, P4, its magazine, P4A. Apart from having serial No 318361, identification marks were made by PW7 and PW3 on the pistol in the form of their respective signatures.

[30] There was no break in the chain of evidence relating to the retention of the pistol, P4 and its magazine, P4A. PW7 had seized the weapon on 29 December 2004 at about 1.05pm. He handed over the weapon at about 5.30pm on the same day to the investigating officer, PW8. PW8 kept the firearm in his locked cabinet. He sent the firearm to the armourer, PW3 on 3 January 2005. PW3 kept the firearm in the almeirah in his office. Having examined and test-fired the firearm, he returned the same to PW8 on 6 January 2005. On 10 January 2005, PW8 registered the firearm and ammunitions with the storekeeper, L/Cpl Rosli. Clearly there was no gap in the chain of evidence relating to the pistol, P4 and its magazine, P4A before it reached the armourer, PW3. All the three prosecution witnesses, PW3, PW7 and PW8 who handled and kept the firearm were called to testify. Unlike in the drugs trafficking case in *Teoh Hoe Chye* where the investigating officer, Mr Lum Weng Foo and in the case of *Abdul Jalil bin Abdul Satar*, one L/Kpl 26093 Tek Kok Liang who sent and collected back the exhibits from the chemistry department, both were not called to give evidence. Thus, there were gaps in the prosecution's case.

[31] However, the appellant's counsel submitted that there was violent discrepancy in relation to the description of the pistol by PW7 and PW3. PW7 described the weapon as an automatic pistol, while PW3 described it as semi-automatic pistol. Bear in mind that both described it as 'pistol' bearing

serial No 318361. The so-called violent discrepancy was relating to the working mechanism of the pistol. On the one hand, it was described as 'automatic' and on the other, it was described as 'semi-automatic', the rest being identical, in particular the serial No 318361. On top of that, PW7 and PW3 had placed identification marks on the pistol, P4. There is no doubt that the pistol, P4 and its magazine, P4A which were produced in court was the very same pistol and magazine seized by PW7 from the appellant's trousers' pocket on 29 December 2004 at about 1.05pm. All the relevant witnesses were called to testify. There was no break in the chain of evidence relating to the identify of the pistol, P4 and its magazine, P4A. There is no merit in the counsel submission on this.

[32] As regard ammunitions, the subject matter of second amended charge, the investigating officer, PW8 said in his evidence that he received three rounds of ammunition together with the pistol, P4 and its magazine, P4A from PW7. He did not state the type of the three rounds of ammunition which he received. There was no evidence that he received 25 rounds of ammunition from PW7. But PW8's evidence showed that he identified all the 28 rounds of ammunition. Subsequently, he sent the pistol, P4, its magazine, P4A and the 28 rounds of ammunition to PW3.

[33] PW3 in his evidence said that he received 28 rounds of ammunition in all; three rounds in the magazine and 25 rounds in the plastic wrapper. His description of the 28 rounds of ammunition were as follows:

(1) three rounds of ammunition of S & B type;

(2) five rounds of ammunition of Manchester Win 9mm; and

(3) 20 rounds of ammunition of R-P 9mm Luger.

[34] There was, therefore, no violent discrepancies as to the ammunitions recovered by PW7 and received by PW3. The appellant's counsel in his written submission had alleged serious discrepancies based on the original second charge which stated that the ammunitions were of.38 types. However, the said charge had been duly amended on 5 May 2006 wherein the total numbers of ammunitions were 28, to wit, '3 rounds of ammunition of S & B type, 5 rounds of ammunition of Manchester Win 9mm and 20 rounds of ammunition of R-P 9mm Luger'. The evidence of PW3 had supported the amended second charge. Thus the appellant's counsel's submission on the ammunitions charge had also failed.

[35] The appellant's counsel also submitted that no where did the prosecution adduced evidence from PW3 that the pistol, P4 which he

examined and test-fired came within the definition of s 2 of the Firearm (Increased Penalties) Act 1971 (FIPA). Section 2 of the FIPA provides that 'firearm' means:

> any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged by means of an explosive charge, and includes a bomb or grenade containing an explosive charge.

[36] The appellant's counsel went on to argue that failure on the part of PW3 to state that the pistol, P4 which he examined and test-fired came within the definition of 'firearm' under s 2 of the FIPA was fatal, citing the Supreme Court case of *Shukri bin Mohamed v Public Prosecutor* [1995] 3 MLJ 229. This is another decision in drugs trafficking case involving cannabis. It involved the evidence of a government chemist.

[37] In another landmark decision of the Supreme Court case of *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265, Abdul Hamid Omar LP held that the evidence of the chemist on the identity and weight of drugs constitute evidence of fact and not opinion. The chemist is merely identifying the nature of drug. Identification is a question of fact, to be proved, like any other conclusion of fact, either by direct or circumstantial evidence: see *Rooker v Rooker* 164 ER 1379 at p 1380. The chemist is, therefore, a factual witness. The need to establish his expertise and to show that he had given evidence in court previously and that his evidence had been accepted do not arise. 'However his expertise and qualification as an expert witness must be established where the evidence consists of not only direct factual observation but of opinion' per Abdul Hamid Omar LP in *Khoo Hi Chiang*.

[38] In the instant case, it did not involve the evidence of a government chemist but the evidence of an armourer, PW3 on the serviceability of the pistol, P4 and the 28 rounds of ammunition. PW3 made a factual observation and physical examination of the pistol. He also test-fired using five live rounds of ammunition. In an Indian Supreme Court case of *Jarnail Singh v State of Punjab* AIR 1999 SC 321, learned counsel for the appellant contended that as the identity of the gun was not established and no evidence of an expert was led to prove that it was in working condition by test firing the same. Nanavati J held that there was no substance in this contention because the type of gun which was found on the appellant was 'Mujhal or Toredar' gun. This type of gun can be fired by first filling it with gun powder. In respect of such a weapon no further test firing was necessary in order to find out whether it was in a working condition or not. Once it was found by the police officer that the mechanism was in order, it could reasonably be inferred that it was in working condition. Therefore, even in absence of any

evidence of an armourer or expert of that type, evidence of a police officer who was trained in handling guns could be accepted.

[39] In the local case of *Public Prosecutor v George Abraham* [1978] 1 MLJ 79, the crucial point to be considered in this case was whether the starting pistol, exh P2 used in sports events fall within the definition of 'firearm' under s 2 of the Internal Security Act 1960 ('ISA'). The scope of the definition of 'firearm' in s 2 of the ISA is wider than the definition of 'firearm' in s 2 of the FIPA as the former definition classify it under four limbs as follows:

> 'firearm' means —
>
> (i) any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged; or
>
> (ii) which can be adapted for the discharge of any such shot, bullet or other missile; and
>
> (iii) any weapon of whatever description designed or
>
> (iv) adapted for the discharge of any noxious liquid, gas or other thing; and
>
> (v) includes any component part of any such weapon as aforesaid.

[40] Syed Agil Barakbah J said that the question whether an article comes within this definition is a question of fact to be decided in each individual case and in approaching the question in particular purpose for which the article is designed and manufactured has to be taken into consideration. No formula can be devised to cover all possible sets of circumstances. Having regard to the evidence of the armament officer, PW1, His Lordship said at p 81:

> considering exh P2 as it is, I do not think it falls within the first and third limbs of the definition of 'firearm'.

[41] His Lordship went on to conclude at the end of his judgment at p 82 as follows:

> I do not consider the starting pistol (exh P2) to be a 'firearm' as defined in s 2 of the Act.

[42] In this case, PW3 examined the pistol, P4 and found that its mechanism was in working order and shots could be discharged. He went on to test-fire the pistol, P4. Having inserted one ammunition, presumably in

A the magazine, he test-fired one ammunition at a time. The first ammunition he used was S & B 9mm ammunition. The second ammunition he used was Win Manchester 9mm. The third, fourth and fifth ammunitions he used were R-P 9mm Luger. He test fired five rounds of ammunitions altogether. There were explosion of all the test-fired ammunitions. He, therefore, B concluded that the pistol was serviceable.

[43] PW3's evidence was based on his observation and physical examination of the pistol. Not only that, he went to test-fire the pistol five times using the ammunitions recovered from the appellant. Clearly PW3's C conclusion was based on his personal tests and observation of facts as immediately perceived by him. His evidence was not based on any opinion at all. It is my considered view that in this case, it is not fatal for PW3 not to mention that the pistol comes within the definition of 'firearm' under s 2 of the FIPA. The court, having regard to the evidence of PW3 and the D opportunity to view the pistol and ammunitions, may make its own conclusion thereof. Indeed I had called and viewed the pistol, P4 and its magazine, P4A myself in the course of these appeals.

E **[44]** By way of contrast, PW3 was not giving evidence pertaining to forensic ballistics and matters relating to gun identification: see *Public Prosecutor v Muhamed bin Sulaiman* [1982] 2 MLJ 320 and *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232.

F **[45]** Be that as it may, PW3 did testify that he was an armament officer for about seven years and had attended the course for about nine months at Maktab Teknik Polis, Bakri, Muar. PW3 was not cross-examined and his evidence was never challenged by the defence. His evidence ought to be accepted until it is rebutted.

G THE APPELLANT EXEMPTED FROM HOLDING ANY ARMS LICENCE OR PERMIT

[46] The prosecution had led evidence that the appellant was a police H officer. In accordance with s 6(2) of the Arms Act 1960, a police officer is exempted from having an arms licence or permit to be in possession of a firearm. A 'police officer' is defined in s 2 of the Police Act 1967 (1967 Act) 'as any member of Royal Malaysia Police'. By virtue of s 19 of the 1967 Act, every police officer is deemed to be always on duty.

I **[47]** Therefore, the appellant being a police officer was not required to possess any arms licence or permit to be in possession of the firearm in question. There was no evidence that the firearm and ammunitions found in his possession was not a Royal Malaysian Police issued weapon.

[48] By virtue of s 106 of the Evidence Act 1950 the burden is on the appellant of proving a fact especially within the appellant's knowledge. For example, on a charge of driving without licence, the onus is on the defendant that he had a licence. In *John v Humpreys* [1955] 1 All ER 793 the court held that:

> the burden of proof that the defendant had a licence lay on him because that fact was peculiarly in his own knowledge, and in the absence of proof on his part that he had a licence the justices ought to have convicted.

[49] But this burden can be discharged from the prosecution's case itself. In the case of *Wong Chooi v Public Prosecutor* [1967] 2 MLJ 180, it was stated that where burden is placed on an accused person to prove anything, by statute or common law, but that burden is only a slight one. This burden can be discharged by evidence of the witness for the prosecution as well as by the evidence for the defence.

[50] Therefore, the prosecution evidence showed that the appellant was a police officer and as such he was exempted from having an arms licence. The burden imposed on him had been discharged, albeit by the prosecution evidence itself.

[51] The short answer to learned counsel's contention lies in s 6(2)(e) itself. It provides:

> Any member of the armed forces, any police officer, or other person engaged in performing police duties in accordance with any written law, may in the course of his duty as such without holding an arms licence or arms permit have in his possession, custody or control, or carry or use arms or ammunition.

[52] The exemption for not holding the arms licence is given 'to any police officer or other person engaged in performing police duties in accordance with any written law'. At the time of the arrest, the appellant was not at any time engaged in performing his police duties. The facts showed that the appellant went to Padang Besar together with the three civilians, SP4, SP5 and SP6 on 29 December 2004, not to perform his police duties in accordance with any written law, but they went there for SP4 to sort out his personal matters pertaining to passport. At such, the appellant though a police officer could not rely on the exemption in s 6(2)(e) for not having the arms licence, as he was not engaged in carrying out any police duties at that material time. The appellant had, therefore, failed to discharge the burden that he had a licence, a fact peculiarly within his own knowledge.

[53] In the light of the above, the prosecution has succeeded in establishing a prima facie case against the appellant on possession of a semi-automatic pistol of NORINCO brand, bearing serial No 318361 which is the subject matter of the first amended charge and the 28 rounds of ammunition of various types, the subject matter of the second amended charge. His defence was rightly called on both the amended charges.

CONSIDERATION OF THE DEFENCE CASE

[54] The appellant elected to give evidence on oath. His explanation as to how he came into possession of the pistol and ammunitions was this. The appellant went to Padang Besar, Thailand together with SP4, SP5 and SP6. The appellant drove his motorcar there. At Padang Besar, Thailand SP4 met one Bechong. After sometimes, he decided to return home. While walking to his motorcar, SP4 followed him from behind, SP4 looked suspicious. The appellant questioned him. SP4 replied that he had purchased the pistol and ammunitions from Bechong at a price of RM2,500. The appellant then seized the pistol and ammunition from SP4. He put the pistol in his right trousers pocket and the ammunitions which was wrapped in plastic wrapper in his left trousers pocket. He then telephoned Padang Besar police station informing about the arrest of SP4 and recovery of the pistol and ammunitions. He did not know who answered his telephone call. No evidence was adduced to substantiate this.

[55] As regard the appellant's explanation that the pistol and ammunitions were seized from SP4, it was not the least possible, let alone probable. He was the only witness for the defence. SP4's evidence did not lend support to the appellant's defence. On the contrary, SP4 had totally demolished the appellant's story. In cross-examination, SP4 vehemently denied the defence suggestions put to him that the pistol was his. SP4 evidence ran as follows:

Q: I put it — you came back with the gun, you behave suspiciously?

A: Tidak setuju.

Q: I put it — OKT questioned you, you panic and said you are delivering the gun to Suresh?

A: Tidak setuju.

Q: I put it — Suresh said he will be handed you and the gun when you cross the border?

A: Tidak setuju.

Q: Kamu takut kerana takut di'implicate' untuk memiliki gun?

A: Tidak setuju. Saya takut dan sedih kerana saya tidak dapat pergi ke India kerana ditahan dan tidak dapat lihat keluarga saya meninggal dunia dalam bencana Tsunami.

Q: Kamu takut kerana memiliki ID4 (ie pistol)?

A: Tidak tahu sama sekali tentang itu.

[56] On the appellant's explanation, the learned sessions court judge found that the appellant has failed to raise any reasonable doubt as to his guilt or the prosecution's case. The prosecution has, therefore, proved its case beyond reasonable doubt. The learned sessions court judge found the appellant was guilty and convicted him.

[57] I, therefore, dismissed the appellant's appeal on conviction of the first and second amended charges. As stated earlier, as the appellant has failed in his appeal on conviction, I now propose to deal with the prosecution's appeal on inadequacy of sentence.

PROSECUTION'S APPEAL ON INADEQUACY OF SENTENCE

[58] The prosecution submitted that the sentence of six years imprisonment and six strokes of whipping on the first amended charge and four years of imprisonment on the second amended charge and the imprisonment terms were to run consecutively with effect from the date of arrest, that is, 29 December 2004. The sentences were inadequate as the appellant was acquitted and discharged on 27 April 2005 and upon appeal by the prosecution, he was called to enter his defence on 14 April 2006 where he was taken into custody since then. As from 27 April 2005 to 14 April 2006, a period of about one year, the appellant was a free man. At the risk of repetition, the sentences of six years and four years imprisonment terms to run consecutively from the date of arrest, that is, 29 December 2004 were inappropriate as the duration of the imprisonment terms were inclusive of one year when the appellant was not in custody (from 27 April 2006 to 14 April 2006). A heavier sentence should be imposed as the appellant was a police officer where he had abused his position of trust as guardian of the law. It was his duty to uphold it. His conduct had tarnished and eroded the public confidence in the police force.

CONCLUSION

[59] I, therefore, set aside the sentence of six years imprisonment term and six strokes of whipping and four years imprisonment term to run consecutively with effect from the date of arrest, that is, 29 December 2004. I hereby dismissed the appellant's appeal on conviction. On the other hand,

I allowed the prosecution appeal on inadequacy of sentence. What is the appropriate length of custodial sentences in the circumstances of this case? And whether the custodial sentences should be made consecutive or concurrent. 'It is a generally accepted working principle that where several offences committed in the same transaction are tried together the sentences imposed for those offences should be made concurrent. Though there has been no precise definition on the term 'the same transaction' for the purpose of deciding when consecutive sentences are appropriate, it is evident that in the instant case the offences arose out of the same transaction: see per Chong Siew Fai J (as he then was) in *Abu Seman v Public Prosecutor* [1982] 2 MLJ 338. And where one charge was a mere subsidiary of another charge, the sentences imposed should be concurrent unless there existed some reasonable grounds for directing otherwise: see the Supreme Court case of *Ooi Sim Yim v Public Prosecutor* [1990] 1 MLJ 88; [1990] 1 CLJ 435.

[60] In *Public Prosecutor v Teh Ah Cheng* [1976] 2 MLJ 186, the appellant was bound over under s 294 of the CPC by special sessions court after he had pleaded guilty to two charges of unlawful possession of an automatic pistol and six rounds of ammunition under s 9(a) of the Arms Act 1960. On appeal by the public prosecutor, Abdoolcader J (as he then was) enhanced the sentenced to three years imprisonment on each charge. The sentences to run concurrently.

[61] In *Public Prosecutor v Chung Kwong Huah* [1981] 1 MLJ 316, the appellant (accused) pleaded guilty to two charges and was sentenced to ten years imprisonment and six strokes for being in an unlawful possession of a Smith & Wesson.32 revolver under s 9 of the Firearms (Increased Penalties) Act 1971 as amended, and to three years for being in an unlawful possession of six rounds of.32 ammunition under s 3 and punishable under s 9 of the Arms Act 1960. Chan J ordered the imprisonment terms to run concurrently.

[62] Guided by the principles enunciated in the above authorities and balanced with the fact that the appellant was a police officer and had no previous conviction, I substitute the sentences passed by the learned sessions court judge with the sentences of eight years imprisonment term and six strokes of whipping on the pistol charge and four years imprisonment term on the ammunitions charge to run concurrently with effect from the date when the appellant's defence was called, that is, 14 April 2006. In imposing the custodial sentence herein, I have taken into account the four months

imprisonment the appellant had served from the date of his arrest on 29 December 2004 to date of acquittal without calling for his defence on 27 April 2005.

Appellant's appeal dismissed and prosecution's appeal allowed.

Reported by Mashrifah Ravendran